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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6355

ORIGINAL COPY

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,
Defendant,
DEBRA JEAN MORRIS
Real Party in Interest
and Appellant

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FOUR

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

In light of the Court's recent decision in Schad v. Borough of Mount Ephraim 41 CCH S. Ct. Bull p B2916 and the decision of the United States Court of Appeals Ninth Circuit in Chase v. Davlaar (USCA, 9th, May 18, 1981) Appellant would offer additional arguments to the central issue before the Court in the above entitled appeal.

THE STANDARD OF REVIEW FOR THE FIRST AMENDMENT PROTECTION OF NUDE ENTERTAINMENT IS UNSETTLED, HOWEVER THE NATURE OF COMMUNICATIVE NUDE ENTERTAINMENT SHOULD PRECLUDE THE EMPLOYMENT OF THE SYMBOLIC SPEECH STANDARD

The decision in Schad v. Borough of Mount Ephraim, supra, has conclusively established that live nude entertainment is entitled to First Amendment protection. The ruling of the California Supreme Court in Crownover v. Musick 9 Cal 3d 405 (1973) that live nude entertainment is "mere conduct" not entered to First Amendment protection is directly in conflict with this Court's decisions and therefore must fall. California v. LaRue 409 US 109 (1972); Doran v. Salem Inn, Inc. 422 U.S. 922 (1975); Schad v. Borough of Mount Ephraim, supra.

The Crownover opinion also concluded that if, however, live nude entertainment contained a protective element; the ordinances were still constitutional under the O'Brien

standard. United States v. O'Brien 391 U.S. 367 (1968). This fail-safe holding in Crownover raises the undecided threshhold issue of whether O'Brien is the proper constitutional standard of review for live nude entertainment. The California Court of Appeal decision, herein, has interpreted the decisions in LaRue and Doran as preserving the viability of the O'Brien standard with regard to the present appeal.

Appellant would respectfully submit that the Court's rulings in LaRue and Doran were based solely upon the power of the states to regulate liquor under the Twenty-First Amendment. The Court has recognized that the regulation of liquor is an objective classification so unrelated to communicative nude entertainment as to preclude the need for constitutional review by either obscenity or symbolic speech standards. California v. LaRue, supra, at 116. Indeed the Schad opinion has reconfirmed the fact that the issue of what constitutinal standard of review "shall be extended to nude dancing" has not been previously determined by the Court. 41 C.C. S. Ct. Bull p B2922.

In a case directly on point, Chase v. Davlaar, supra, the United States Court of Apeals (Ninth Circuit) found a county resolution which prohibited topless entertainment in all non-theatrical establishments selling food or beverages ("including but not limited to alcoholic beverages") unconstitutionally overbroad on its face. The federal appellate

court held that the valid governmental interests to be promoted by the resolution "could have been served just as well by a more narrowly drawn statute applicable only to liquor selling establishments." Chase v. Davlaar, supra at ___.

The Court in Chase v. Davlaar, supra, at footnote 13 and 14 dismissed the relevancy of the O'Brien standard to live nude entertainment and thereby placed the federal opinion in direct conflict with the contrary holding in Crownover v. Musick, supra, at 427. The Ninth Circuit Court characterized the symbolic speech issue presented in O'Brien as "conduct generally considered non-expressive, which the actor asserts to be communicative." Chase v. Davlaar, supra, at ___. In contrast, the county resolution in the Chase opinion was overbroad because the resolution protected establishments from presenting entertainment "ordinarily regarded as expressive." Chase v. Davlaar, supra, at ___. The appliability of the O'Brien standard is limited to an act of symbolic speech which is not essentially related to protected communication, and can be clearly differentiated from the expression of dance which is performed on a stage as entertainment for an audience.

The Court in O'Brien, supra, at 382, insured the narrow scope of the symbolic speech standard by limiting the govern-

mental interests in regulating conduct to the "noncommunicative impact" of conduct. The O'Brien opinion distinguished a noncommunicative governmental interest, such as the availability of issued selective service certifications, from the case "where the alleged conduct arises in some measure because the communication allegedly integral to the conduct itself is thought to be harmful." United States v. O'Brien supra at 382. In the present appeal the purpose of the county ordinance is to prohibit nudity in live entertainment because the effect of nude entertainment on audiences is considered harmful.

Assuming, arguendo, the applicability of the O'Brien standard, the county ordinance can be sustained as a regulation of noncommunicative conduct only if the governmental interests are unrelated to the suppression of free expression. United States v. O'Brien, supra. Based upon the rationale of only regulating "the form or manner" of the communication the Crownover court concluded that the regulation of conduct (costuming) did not affect the speech (dance) Crownover v. Musick, supra, at 68.

Yet by changing the form or manner of entertainment, through the regulation of costuming, the requisite relationship between nudity and the expression of dance is significantly altered. In comparison to the state's valid interest in regulating liquor, the regulation of a performer's cos-

tume in a non-alcoholic location clearly establishes the government's aim as "prohibiting a type of entertainment" Crownover v. Musick, supra, Justice Tobriner's dissent at 707.

The court in Chase v. Davlaar, supra, footnotes 4 and 12, termed the speech/conduct dichotomy as conceptually weak and found the distinction unable to resolve the overbreadth problem as insubstantial in view of this Court's decision in California v. LaRue, supra. The same overbreadth problem arises in the county ordinance involved herein, where nude entertainment in non-alcoholic establishments is banned. The Crownover opinion gave no significant justification for the exclusion of protected nude entertainment in establishments not serving liquor. Nor was any evidence presented in the Crownover decision showing a nexus between live nude entertainment in non-alcoholic establishments and the occurrence of unusual problems for the community, Schad v. Borough of Mount Ephraim 41 C.C.H. S. Ct. Bull p. B2929.

Appellant would respectfully submit that such a nexus between nude entertainment and related objectionable conduct has only been demonstratd in liquor licensed bars and nightclubs where nude entertainment has been featured, California v. LaRue, supra.

CONCLUSION

Appellant's appeal raises an important question of first impression for the Court regarding what constitutional standard shall be employed in reviewing communicative nude entertainment presented in non-alcoholic establishments. The constitutional validity of the California Supreme Court's decision in Crownover v. Musick, supra, rests upon whether the O'Brien standard is applicable, and if so, whether the county ordinance satisfies the O'Brien's standard. The decision in Chase v. Davlaar, supra, dismissed the applicability of the O'Brien standard and thereby created an irrevocable conflict betwen state and federal case law, Crownover v. Musick, supra.

Appellant would respectfully submit that the intervention of this Court is needed in order to resolve the conflict of constitutional law and preserve Appellant's First Amendment rights.